BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

ANNA L. GIBSON	)	
Claimant	)	
	)	
VS.	)	
	)	
KANSAS MASONIC HOME	)	
Respondent	)	Docket No. 1,027,611
	)	
AND	)	
	)	
KANSAS ASSOCIATION OF HOMES FOR THE AGING INSURANCE GROUP, INC.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requested review of the May 2, 2006, preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

The Administrative Law Judge (ALJ) found that claimant aggravated a preexisting condition on January 24, 2006, and is entitled to workers compensation benefits. Accordingly, the ALJ authorized Dr. David Lauer as claimant's treating physician. Temporary total disability benefits were ordered paid by respondent for a period beginning February 20, 2006, continuing through March 17, 2006, with future temporary total disability benefits to be paid if claimant is taken off work by her authorized treating physician.

Respondent contends that claimant has failed to prove personal injury by accident arising out of and in the course of her employment but, instead, suffers from preexisting, symptomatic lumbar arthritis. Respondent also asserts that if claimant did suffer a work-related aggravation, it was temporary and claimant has recovered from that aggravation. Therefore, if there is a need for medical treatment, it was not caused by the alleged personal injury arising out of and in the course of employment. In addition, respondent

contends claimant's injury is barred by K.S.A. 2005 Supp. 44-508(e) because she suffers disability as a result of the natural aging process or by the normal activities of day to day living. Finally, although at the preliminary hearing respondent denied that timely notice of accident was given, that issue was not briefed and appears to have been abandoned.

Claimant has not filed a brief in this appeal.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The record consists of the transcript of the April 13, 2006, preliminary hearing and the exhibits offered and admitted into evidence at that hearing. Respondent's June 1, 2006, brief to the Board states that the record also includes a March 17, 2006, deposition of claimant. And a copy of the transcript of that deposition is attached to respondent's brief. The administrative file does not contain the original transcript of that deposition. The deposition transcript attached to respondent's brief does not reflect that claimant's deposition was taken as an evidentiary deposition as opposed to a discovery deposition. There was no mention of the claimant's deposition testimony being a part of the record at the preliminary hearing. The administrative file does not contain a stipulation by counsel to the effect that the record should include the March 17, 2006, deposition. It does not appear that the March 17, 2006, deposition of claimant was part of the record considered by the ALJ. Therefore, it is not part of the record on appeal.[1]

Claimant has been employed by respondent since June 1990, and her current position is certified restorative aide. She admits that she has a longstanding problem of lumbar arthritis, and she has been seeing a chiropractor for a couple of years for treatment of this condition. Her claim of a work-related injury is two-fold. First, she claims that after respondent took away the restorative room, she was required to stand over patient's beds and lean over patients to assist them in performing their exercises. She claims her lower back started hurting her more as she was leaning over the beds to perform the exercises. Second, on January 24, 2006, while ambulating a patient, she developed a spasm in the muscle in her low back, which required her to leave work early. When she left, she told her supervisor that it was the arthritis in her lower spine that was hurting.

Claimant first saw her primary care physician, Dr. Lauer, concerning her low back pain. Dr. Lauer's notes of January 26, 2006, do not indicate that claimant complained of an injury or incident on January 24 that caused a muscle spasm. He diagnosed her with myofascial lumbar pain with underlying degenerative arthritis. Dr. Lauer's progress note of February 2, 2006, indicates that he took her off work from January 25, 2006, through February 5, 2006. He released her to return to work on February 6 with a 20 pound lifting restriction. But claimant was advised that respondent would not allow her to work with that restriction. Until that time, workers compensation was not mentioned. Claimant decided

[1] K.S.A. 44-555c(a).

to file a workers compensation claim after respondent would not accommodate her work restrictions.

Claimant saw Dr. James Littell on February 7, 2006, at the request of respondent. She told him that she had a 10-year history of back pain and told him about the incident on January 24. After examination, Dr. Littell diagnosed her with chronic low back pain of undetermined etiology. He returned her to work with a 30-pound lifting restriction, and respondent allowed her to work with that restriction. She went back to Dr. Littell's office on February 16, at which time she was seen by Dr. Jon Kirkpatrick. Claimant testified that Dr. Kirkpatrick told her he did not feel this was a workers compensation injury and that she needed to go back to her primary care physician and follow his restrictions.

Claimant returned to Dr. Lauer, who took her off work from February 20 through March 17, 2006. He sent her to physical therapy and prescribed a TENS unit and medication. There is nothing in Dr. Lauer's records concerning whether claimant suffered a work-related injury.

Claimant was seen by Dr. Paul Stein at the request of her attorney on March 17, 2006. After examining claimant, Dr. Stein opined that she sustained a back strain with myofascial pain at work on January 24, 2006. Because there was no radicular symptomatology, epidural steroid injections were not indicated. Dr. Stein's only treatment recommendation was for claimant to enter a physician-directed weight reduction program followed by a home stretching and strengthening program for the low back. Dr. Stein increased claimant's lifting restriction to 40 pounds, 30 pounds occasionally and 15 pounds more often.

Claimant admits that she saw Dr. Lauer on December 13, 2005, complaining of low back pain. She denied any injury at that time. Claimant admitted that she lied to her supervisor on that day, telling her that she was taking the day off to put up a Christmas tree. Instead, she left because of low back pain. She was afraid that if she told her supervisor that her pain was work related, she would not be allowed to work.

Sandy Stroud is clamant's supervisor at respondent. Ms. Stroud verified a written statement she made after claimant filed her workers compensation claim to the effect that when claimant requested to be able to leave work on January 24, 2006, she indicated it was not work related but was because of her arthritis. Ms. Stroud testified that she saw claimant performing range of motion exercises with a patient in the patient's room that required her to bend over the bed and lift the patient's limbs. She stated that claimant would always have had to perform some exercises in patients' rooms and that the restorative room was only for those exercises requiring equipment. She states there is still an exercise room in another area where patients can be taken to use the equipment.

Respondent argues that claimant's injury did not "arise out of" her employment because her injury was preexisting and any aggravation occurred while doing normal activities of day-to-day living.[2]

The phrases "arising out of" and "in the course of"

> have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment. [Citation omitted.][3]

The Kansas Supreme Court has held that there are three general categories of risks in workers compensation cases: (1) risks distinctly associated with the job; (2) risks which are personal to the worker; and (3) the so-called neutral risks which have no particular employment of personal character.[4] Only those risks falling in the first category are universally compensable; personal risks do not rise out of the employment and are not compensable.[5]

The claimant in *Martin*[6] was a custodian at a public school, who suffered from a long history of back problems. Upon arriving at the parking lot of the school, Martin attempted to get out of his vehicle but twisted his back. The court denied compensation, concluding that the risk involved in Martin's accident was not associated with his employment and there were no intervening or contributing causes for the accident. Rather, the risk was personal to Martin. The fact that Martin's back problems could be aggravated by almost any everyday activity bolstered the court's conclusion that his injury was the result of a personal risk.[7]

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[2] See K.S.A. 2005 Supp. 44-508(e).

[3] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 197-98, 689 P.2d 837 (1984).

[4] *Hensley v. Carl Graham Glass*, 226 Kan. 256, 258, 597 P.2d 641 (1979).

[5] *Martin v. U.S.D. No. 233*, 5 Kan. App. 2d 298, 299, 615 P.2d 168 (1980).

[6] *Id.*

[7] *Id.* at 300.

The claimant in *Boeckmann*[8] was an inspector of truck and tractor tires who suffered from degenerative arthritis of his hips. He underwent an operation on his left hip, but within three years the pain in his right hip began to worsen. Three weeks before his injury, Boeckmann was lying on a conveyor belt. As he got up, he felt a pain in his back. Boeckmann was not able to work for three days. The day of his injury, Boeckmann stooped down to pick up a tire and injured his back. The court denied compensation, finding that Boeckmann's everyday bodily motions required at work gradually and imperceptibly eroded the physical fibers of his structure. The court further found that any movement would aggravate Boeckmann's condition, regardless of whether the activity took place on or off the job.[9]

The claimant in *Anderson*[10] installed convertible tops, headliners, and carpets. Anderson suffered from a long history of back problems. He got in and out of vehicles 20 to 30 times a day, and on one occasion he injured his lower back.

The court distinguished *Anderson* from *Martin* and *Boeckmann*, finding that Anderson's injury followed not only from his personal degenerative conditions but from a hazard of his employment, *i.e.*, the requirement that he constantly enter and exit vehicles. The court found the fact that Anderson's back problems could be aggravated by everyday activities was not controlling.[11]

> Where an employment injury is clearly attributable to a personal (idiopathic) condition of the employee, and no other factors intervene or operate to cause or contribute to the injury, no award is granted. [Citation omitted.] But where an injury results from the concurrence of some preexisting idiopathic condition *and* some hazard of employment, compensation is generally allowed.[12]

The court determined that Anderson's injury resulted from the combination of his preexisting personal degenerative conditions and a work-related hazard.[13]

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[8] *Boeckmann v. Goodyear Tire & Rubber Co.*, 210 Kan. 733, 504 P.2d 625 (1972).

[9] *Id. at 739.*

[10] *Anderson v. Scarlett Auto Interiors*, 31 Kan. App. 2d 5, 61 P.3d 81 (2002).

[11] *Id.* at 11.

[12] *Id.* at 11 (quoting *Bennett v. Wichita Fence Co.*, 16 Kan. App. 2d 458, 460, 824 P.2d 1001 [1992]).

[13] *Id.* at 12.

Like *Anderson*, had claimant not been employed as she was, she would not have been equally exposed to the risk that ultimately caused her injury.[14] Accordingly, the Board finds that claimant's injury arose out of her employment.

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Nelsonna Potts Barnes dated May 2, 2006, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of August, 2006.

_____
BOARD MEMBER

c: Joseph Seiwert, Attorney for Claimant
Michael L. Entz, Attorney for Respondent and its Insurance Carrier

[14] See *Id.* at 11.